IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE JURISDICTION

CRIMINAL APPEAL No.28 OF 1996

Administration of Union Territory
of Dadra and Nagar Haveli. ..Appelant.

vs.

1. Maganbhai Laxmibhai Vartha.
2. The State of Maharashtra. ..Respondent.
(No.1-ori.
Accused).

Shri R.M. Agrawal for the appellant.

Shri P.N. Shah, Advocate appointed for respondent
No.1-accused.
Shri A.M. Shringarpure,A.P.P. for the State.

CORAM : V.G.PALSHIKAR AND V.C.DAGA, JJ.
DATED : 6th June 2005.

ORAL JUDGMENT:(Per V.C. Daga,J.)

1. This appeal against the order of acquittal passed by the Sessions Judge, Dadra and Nagar Haveli, Silvassa, dated 21.8.1993 in Sessions Case No.2/93 acquitting the respondent No.1- original accused of the charge under section 302 and 412 of the Indian Penal Code was heard and dismissed by us for the reasons to be recorded separately. Accordingly, reasons based on facts are being recorded herein.

THE FACTS:

2. The occurrence giving rise to the incident in brief is alleged to have taken place in the evening of 24.10.1992 resulting from the quarrel between the accused and the deceased, on account of

alleged loan transaction involving an amount of Rs. 30,000/-.

3. It is alleged that the accused had borrowed Rs. 30,000/- from the deceased-Navala, who used to repeatedly knock the doors of the accused for recovery of the alleged amount of loan, alleged to have been borrowed by the accused. The accused entertained a belief that this act of the deceased -Navla had damaged the prestige of his family. One of such demands made on 24.10.1992 resulted in heated exchange of words between the two. It is alleged that accused in the heat entered the house of the deceased with an iron bar and assaulted the deceased- Navala giving number of blows on his chest, shoulder and stomach, resulting in the death of the deceased on the spot.

4. F.I.R. of the said incident came to be lodged on 25.10.1992 by P.W. 2-Rajesh with Silvassa Police Station at about 4 a.m. On the basis of the said complaint offence came to be registered . The said offence was investigated by PSI- Rathod (PW 10), attached to Silvassa Police Station, who, during the course of investigation, visited the place of incident at 6.15 a.m. with a photographer. Photographs were taken in the presence of the 2 panchas namely; P.W.7-Bhagubhai and one Kushal. In

their presence, first inquest was also conducted on the dead body as per Ex.17 and thereafter dead body was sent to the Cottage Hospital, Silvassa for autopsy.

5. Shri Rathod, PSI, under panchanama from the place of offence collected blood mixed earth and sample earth from 3 places in 3 different packets and same were sealed. One 1 shirt and pant lying on the cot were also attached under panchanama (Ex.16) The statements of P.W.5-Pali and 5 others came to be recorded. It appears that Shri Rathod, PSI made search for the accused but he could not trace him. In the Cottage Hospital, PW 4- Dr. Shinde received the dead body of deceased Navla on 25.10.1992. He conducted post-mortem examination on the said dead body on the same day. He prepared memorandum of his examination as per Exh.12 and found that cause of death of the deceased Navla was shock and haemorrhage due to rupture of vital organs like sphen liver and kidney.

6. On 26.10.1992 Shri Rathod, PSI recorded statement of PW 3- Pagan Premji, his wife Shanti and 7 others and also made search for the accused but he could not be traced. Ultimately, on 23rd November, 1992 accused came to be arrested. His clothes i.e. short and pant came to be attached under a

panchanama Ex.20. On 27.10.1992 and 29.10.1992, statements of 9 and 6 witnesses; respectively, came to be recorded.

7. After completing the investigation, on 16.2.1993, Shri Rathod, PSI filed charge-sheet against the accused in the Court of Chief Judicial Magistrate, Silvassa, for offence under section 302 of the I.P.C. The Chief Judicial Magistrate finding that the said offence was triable by the Sessions Court, he committed the case to the Court of Sessions in usual manner,where the respondent was charged for the offence under section 302 of the I.P.C. Accused pleaded not guilty to the charge. His case was of total denial. He alleged that he was falsely implicated in the offence.

8. With the aforesaid factual matrix, prosecution examined total Ten witnesses in support of its case out of which 8 were eye witnesses. P.W 2 Rajesh, though lodged complaint, did not support the prosecution case. He, thus, was declared hostile by the prosecution. He was cross-examined with the permission of the Court. The prosecution case mainly centres around the evidence of P.W.3 - Magan Premji, P.W.5 Pali and P.W.6-Shanti who are the eye witnesses to incident in question.

VERDICT OF THE TRIAL COURT:

9. The trial Court after taking survey of the evidence of various witnesses found number of discrepancies in the evidence of almost all the witnesses. The trial Court while appreciating the evidence of the eye-witnesses namely, P.W.3-Magan, P.W.5 Pali and P.W.6-Shanti found that their evidence was full of contradictions and inconsistencies. The same was running counter to the medical evidence available on record. Consequently, all the 3 witnesses came to be disbelieved by the trial Judge.

10. The trial Court after having considered the evidence with other various circumstances available on record in para 16 of its judgment expressed its inability to accept the case of the prosecution finding it difficult to reconcile the evidence with attendant circumstances.

11. The trial Court, while appreciating the motive found no evidence to attribute any motive for the alleged offence alleged to have been committed by the accused. It is observed that few days before the date of incident, accused and one police constable had lunch in the house of the deceased in the afternoon. At that time, nothing had happened

to provoke the accused. This circumstance was treated as a piece of evidence to show that accused had cordial relations with the deceased.

12. The trial Court also found that material witnesses were not examined. There were in all 8 eye witnesses. Out of them only 3 witnesses, viz. wife of the deceased Pali, Pali's brother Magan and Shanti, wife of Magan, were examined. As per trial Court no reason was disclosed as to why other eye-witnesses were not examined. With this material on record, the trial Court after hearing the parties to the trial was pleased to acquit the accused finding that in the facts of the case he could not be found guilty of the offences under section 302, r/w 452, I.P.C. Hence this appeal.

CONSIDERATION:

13. We have heard Shri R.M. Agrawal, learned Counsel appearing for the appellant and learned Counsel for the respondents. We were also taken through the deposition of the prosecution witnesses tendered and proved by the prosecution, statement of the accused recorded under section 313 of the Cri.P.C. as also the impugned judgment. While considering this appeal, we must bear in mind the extent of the powers of the High Court in an appeal

against acquittal. Readily available judgment of the Apex Court in the case of **Laxman Kalu vs.State of Maharashtra, AIR 1968 SC 1390** can be referred to in this behalf, wherein the Supreme Court observed as under:

> " The powers of the High Court in an appeal against the acquittal are not different from the powers of the same Court in hearing an appeal against a conviction. The High Court in dealing with such an appeal can go into all the questions of fact and law and reach its own conclusions on evidence provided it pays due regard to the fact that the matter had been before the Court of Session and the Sessions Judge had the chance and opportunity of seeing the witnesses depose to the facts. Further the High Court in reversing the judgment of the Sessions Judge must pay due regard to all the reasons given by the Sessions Judge for disbelieving a particular witness and must attempt to dispel those reasons effectively before taking a contrary view of the matter. It may also be pointed out that an accused starts with a presumption of innocence when he is put up for trial and his acquittal in no sense weakens that presumption, and this presumption must also receive adequate consideration from the High Court."

Bearing the above principle in mind, in our view, this is a case wherein impugned order is liable to be maintained and respondent No.1-accused deserves to retain benefit of doubt given by the trial Court for the reasons recorded herein.

14. So far as motive is concerned, the same has not been proved. Merely because the deceased asked for amount borrowed by the accused, that by itself

cannot be circumstance to allege motive to liquidate the deceased. The trial Court has rightly appreciated the circumstance which has unequivocally established cordial relationship between the deceased and the accused. No evidence is available on record to suggest any provocation to the accused.

15. Apart from the above, the best independent witnesses other than close relatives of the deceased to prove the offence has not been examined by the prosecution nor any reason have been furnished for not examining them. Section 114(g) of the Indian Evidence Act provides that if the evidence which could be and is not produced, the presumption is, that, it would have gone against the party who withholds it. In our view, since the prosecution has not spelt out any reason for not examining other 5 witnesses, this is a fit case for adverse inference against the prosecution.

16. The appreciation of the evidence done by the trial Court is as per the settled principles of law and the view taken is a reasonable and possible view sustainable on the basis of the evidence available on record. No interference is thus warranted in this appeal.

17. In the above view of the matter, we find no

substance in this appeal. Appeal is, therefore, liable to be dismissed. The same is accordingly dismissed.

(V.C.AGA,J.) (V.G.PALSHIKAR,J.)